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MAY 14 1991

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	
NO. 72399-s41D BY UNITED STATES OF)	FINAL ORDER
AMERICA, UNITED STATES DEPARTMENT)	
OF THE INTERIOR, BUREAU OF LAND)	
MANAGEMENT)	

* * * * *

On February 4, 1991, the Proposal for Decision in this matter was entered and served on all parties. Timely exceptions to the Proposal for Decision were filed by Applicant and by Objectors Jeff and Patty Walker. Neither party requested that oral arguments be held on the exceptions. Responses to Applicant's exceptions were received from Objectors.

The Proposal for Decision concludes in a Proposed Order denying the Application. The Proposed Order is based on a finding that Applicant failed to prove by substantial credible evidence that it has possessory interest in the proposed place of use. Applicant's exceptions address this finding. Specifically, Applicant contends Finding of Fact 14 fails to acknowledge all of the facts in the record concerning the proposed place of use and Conclusion of Law 11 fails to address requirements of legal analysis in examining the evidence and burden of proof.

Applicant offers a revised Finding of Fact 14 generally the same as the finding in the Proposal except for the addition of three statements. Applicant's alternative Finding of Fact 14 adds a statement that the line between Sections 5 and 8 referred

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to in the Proposal is the limit of the legal land description in the land patent obtained by the Objectors' predecessors in interest. Applicant also adds a statement noting that a fence was recently "erected on the patent line, but later was removed by the Objector." These are true statements according to the evidence in the record. While the statements provide further details on the question of ownership of the place of use, their addition would not alter the Conclusions of Law based on this Finding of Fact. The record contains evidence of post-patent transactions that may have altered the boundaries of the homestead to include the proposed place of use (see discussion of Conclusion of Law 11 below). The record does not support a finding that erection of the new fence was a settlement of the question of ownership of the proposed place of use.

In its alternative Finding of Fact 14, Applicant also adds that the record is void of any indication that Applicant was on notice of the alleged discrepancy between the old fence line and Objectors' property line when the property was owned by Objectors' predecessors in interest. This is not true. Several documents in evidence show that Objectors' predecessors were in frequent contact with Applicant about the parcel of land between the fence and the section line. Furthermore, Applicant's records of the original township survey identify the existence of the old fence line and its lack of conformity with the line between Sections 5 and 8.

An agency's final order may not reject or modify a finding of fact in a proposal for decision unless the agency first determines from a review of the complete record that the finding of fact was not based on competent substantial evidence or that the proceedings on which the finding was based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3) (1989). Finding of Fact 14 in the Proposal for Decision is based on substantial credible evidence, is not in error, and consequently will not be modified. See In re Application No. 150741-41H by William Tietz; In re Applications Nos. 27941-s40A and 50642-s40A by Zinne Brothers; In re Application No. 12826-g76LJ by Ridgewood; see also In re Application No. G05081 and G05083 by Neil W. Moldenhauer.

Applicant's arguments with respect to the Proposal's Conclusion of Law 11 could be compelling if the Department had jurisdiction to find in favor of either party in determining the dispute over land ownership. As Conclusion of Law 11 states and documents, and as both parties agree, the Department does not have such jurisdiction. The Department may only review the evidence provided to determine whether there is substantial credible evidence sufficient to prove that the proposed appropriation will meet the statutory criteria for issuance of a permit. As to this criterium, the evidence in the record is clearly ambiguous, as was stated in the Proposal at Finding of Fact 15 to which no exceptions were filed. Applicant's arguments on how the ambiguous evidence would be interpreted under federal

codes do not make the evidence less ambiguous in the context of this proceeding because interpretation of federal code is outside the jurisdiction of the Department. Given the ambiguity of the evidence and the scope of the Department's jurisdiction, the only conclusion that can be reached is that the criterium in § 85-2-311(f), MCA, has not been met. Conclusion of Law 11 will not be modified.

Objectors filed exceptions to the Proposal for Decision stating that they agree with the conclusion of the Proposal, i.e., denial of Application for Beneficial Water Use Permit No. 72399-s41D, but make their exceptions for the record because Objectors believe the Proposal is inconsistent with testimony in the record. The Department is not required to consider exceptions from parties that are not adversely affected by a proposal for decision. Mont. Admin. R. 36.12.229(1) (1984). Because the Department will be adopting the Proposal for Decision as written, Objector will not be adversely affected. Therefore, while they remain a part of the record in this matter, Objectors' Exceptions will not be addressed in this Final Order. See In re Application No. G45422-76M by Paul A. and Natalie L. Hanson dba Hanson Ranch.

Upon review of the evidence herein and consideration of the exceptions, the Findings of Fact and Conclusions of Law in the Proposal for Decision are hereby adopted by the Department.

WHEREFORE, based upon the record herein, the Department makes the following:

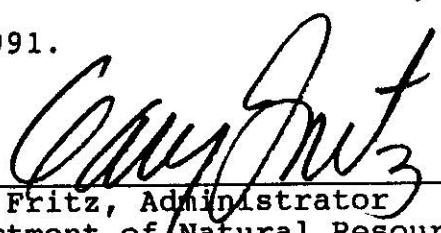
ORDER

Application for Beneficial Water Use Permit No. 72399-s41D by United States of America, United States Department of the Interior, Bureau of Land Management, is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 15 day of April, 1991.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 16th day of April, 1991 as follows:

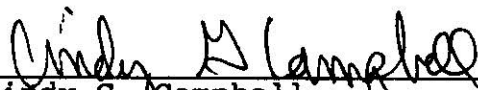
Bureau of Land Management
Dillon Resource Area
1005 Selway Drive
Dillon, MT 59725

John C. Chaffin
Office of the Field
Solicitor
P.O. Box 31394
Billings, MT 59107-1394

Jeff and Patty Walker
Box 81
Glen, MT 59732

R. Mark Josephson
Josephson & Fredricks
115 West Second Avenue
P.O. Box 1047
Big Timber, MT 59011

T.J. Reynolds, Manager
Helena Water Resources
Regional Office
1520 East 6th Avenue
Helena, MT 59620


Cindy G. Campbell
Hearings Unit Legal Secretary

FILMED

MAR 13 1991

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 72399-s41D BY UNITED STATES OF)
AMERICA, UNITED STATES DEPARTMENT)
OF THE INTERIOR, BUREAU OF LAND)
MANAGEMENT)

**PROPOSAL FOR
DECISION**

* * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on October 16, 1990, in Butte, Montana, to determine whether the above Application should be granted to the United States of America, United States Department of the Interior, Bureau of Land Management (hereafter "BLM" or "Applicant"), under the criteria in § 85-2-311(1), MCA.

Applicant was represented by John C. Chaffin, attorney. The following witnesses testified in behalf of Applicant: Mike Browne, BLM hydrologist; Frances Rieman, BLM Water Rights Specialist; and Dean Bolstad, BLM Natural Resource Specialist.

Objectors were represented by R. Mark Josephson, attorney. Objector Jeff Walker testified in his own behalf. The following witnesses also testified in behalf of Objectors: Otto Henry Sassman, former owner of Walker property; and Mary Reynolds, former owner of Walker property.

EXHIBITS

Applicant offered the following exhibit which was accepted into the record without objection.

Applicant's Exhibit 1 consists of three pages. Page one is a certified copy of a plat entitled "Township 4 South Range 9

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West of the Principal Meridian, Montana - Status of Public Domain Land and Mineral Titles". Page two is a certified copy of an enlargement of the portion of the preceding plat that shows all of Sections 4, 5, 8, and 9. At the hearing, the location of subject spring and Walker property were marked by Frances Rieman in yellow highlighter on the second plat. Page three is an instruction sheet on how to read such plats which includes a diagram entitled "Explanatory Township".

Objectors offered the following exhibits for inclusion in the record.

Objectors' Exhibit 1 consists of three pages. The first page is a copy of a memorandum from Mike Browne to Area Manager, DRA, dated August 15, 1990. The following two pages are a copy of a memorandum from Robert Bump, Soil Scientist, to Area Manager, Dillon Resource Area, dated June 8, 1990.

Objectors' Exhibit 2 and 2A consist of copies of two plats, both entitled "Township No. 4 South, Range No. 9 West, of the Principal Meridian, Montana". Exhibit 2 is a copy of the plat of the 1943 Dependent Resurvey; Exhibit 2A is a copy of the plat showing, principally, the 1914 survey.

Objectors' Exhibit 3 consists of five sheets on which are copied ten pages from the transcribed survey notes from the 1914 survey in said Township and Range.

Objectors' Exhibit 4 is a copy of a two page, hand-written agreement signed by C. W. Frame and Gladys E. Frame dated August 18, 1953.

Objectors' Exhibit 5 is a copy of a two page letter from W. B. Wallace, Regional Administrator, BLM Region III, to Hon. Wesley A. D'Ewart, House of Representatives, Washington, D. C., dated January 25, 1954.

Objectors' Exhibit 6 is a copy of a two page memorandum from L. I. Hagener to Tungsten Mill Spring project file #6088 dated April 18, 1988.

Objectors' Exhibit 7 is a copy of a memorandum from Richard K. Aldrich, Field Solicitor, Pacific Northwest Region (Billings), to State Director, BLM, dated September 1, 1988, and signed by John C. Chaffin for the Field Solicitor.

Objectors' Exhibit 8 is a copy of a two page memorandum from Deputy State Director through District Manager, Butte, to Area Manager, Dillon Resource Area, dated March 2, 1989.

Objectors' Exhibit 9 consists of copies of six pages from the Lost-Willow Grazing Plan, East Pioneer Stewardship Unit.

Objectors' Exhibit 10 consists of eight pages. The first four pages are copies of two Cooperative Agreements (BLM Form 4-1119). The fifth page is a copy of an Assignment of Cooperative Agreements (BLM Form 4300-13) naming Kambich Ranch, Inc. as assignee. The sixth and seventh pages are Job Inspection Records (BLM Form 7330-5) for McVee Spring and Mineral Spring both dated October 23, 1970. The eighth page is a Job Inspection Record and Maintenance Schedule (BLM Form 7120-3) for Mineral Spring dated August 28, 1973.

Objectors' Exhibit 11 consists of nineteen color photographs (individually numbered on the reverse side) depicting certain lands and developments in the vicinity of the proposed source.

Objectors' Exhibit 12 is a copy of a Confirmation/Report of Telephone Conversation (BLM Form 1541-3) on a call from Dean Bolstad to John Moorehouse dated March 16, 1989.

Objectors' Exhibits 1 through 8, and 12 were accepted into the record without objection.

The Hearing Examiner questioned the relevance of Objectors' Exhibit 9 which precipitated an objection to the exhibit by Applicant. The objection was overruled at the hearing as the Hearing Examiner found that the exhibit appeared to be relevant to Applicant's ability to fulfill § 85-2-311(c), MCA. Objectors' Exhibit 9 was accepted into the record at the hearing.

Applicant objected to Objectors' Exhibit 10 on grounds of lack of relevance and lack of foundation. Ruling on the objection was suspended. The objection is hereby overruled as the exhibit appears to have relevance to Applicant's ability to fulfill § 85-2-311(c), MCA. Objectors' Exhibit 10 is hereby accepted into the record.

Applicant objected to photographs OP6 through OP19 of Objectors' Exhibit 11 on grounds of lack of relevance. Applicant's objection was overruled at the hearing as the Hearing Examiner found the exhibit was corroborative of testimony related to Applicant's fulfillment of § 85-2-311(c) and (d). Objectors' Exhibit 11 was accepted into the record at the hearing.

All parties had opportunity to review the Department of Natural Resources and Conservation's (hereafter "Department") file on this Application prior to the hearing. No objections to any portion of the file were expressed. The file was, therefore, entered into the record by the Hearing Examiner in its entirety.

Objectors specifically referred the Hearing Examiner to two documents in the Department's file: Memorandum from L. I. Hagener, Range Conservationist to Tungsten Mill Spring & Fence Project File #6088, dated March 15, 1988; Application for Special Land-Use Permit in the names of C. W. Frame and Gladyce E. Frame, dated August 20, 1953.

The Hearing Examiner takes notice of the following materials: 1) Department's water rights records, i.e., the computerized data system and microfilm files on all water rights on file with the Department; 2) the Water Right Examination Rules, adopted by the Montana Supreme Court effective July 15, 1987, as revised and amended by Order of July 13, 1989; and 3) the New Appropriations Verification Policy, Department of Natural Resources and Conservation; February 20, 1987 (as revised August 7, 1987); Page 112 (hereafter "Department's policy manual"). These materials are specialized materials in general use by the Department in the conduct of its technical duties in the area of water rights.

PRELIMINARY MATTERS

Upon completion of Applicant's presentation of their case in chief, Objectors moved for a directed verdict under Rule 50, M.

R. Civ. P. The Motion was denied as the Hearing Examiner found that Applicant had produced prima facie evidence in support of the criteria in § 85-2-311(1), MCA.

At the close of the hearing both parties agreed, in lieu of oral closing arguments, to simultaneously submit proposed findings of fact and conclusions of law to the Hearing Examiner. A schedule was established for simultaneous submittal. Applicant submitted a document entitled "Closing Argument" which is not in the form of proposed findings of fact and conclusions of law nor does it contain titles suggesting proposed findings of fact and conclusions of law; therefore, it was treated as a written closing statement or brief. Proposed findings of fact and conclusions of law were received from Objectors. Pursuant to § 2-4-623(4), MCA, the proposed findings of fact submitted by Objectors are addressed in an accompanying Memorandum which is incorporated herein by reference.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 72399-s41D was filed with the Department of Natural Resources and Conservation on August 1, 1989, at 10:55 a.m. (Department's file)

2. Applicant proposes to appropriate 3 gallons per minute (gpm) up to 1.60 acre-feet (AF) per year of surface water from an unnamed tributary of Sassman Gulch for stock watering purposes. The proposed source is a spring in the SW¼SE¼SE¼ of Section 5, Township 4 South, Range 9 West, Beaverhead County, Montana.

Applicant proposes to divert the water by means of an infiltration gallery from May 1 through November 15 of each year. The proposed place of use is in the SW¼SE¼SE¼ of said Section 5. (Unless specifically identified otherwise, all legal land descriptions herein are within the above-stated township and range.) (Department's file)

The proposed source has been called by various names, including "BLM JDR #6088 - Mill Spring", "Shotgun Spring", "Rock Creek Spring", and "Tungsten Mill Spring". Applicant refers to it on their application form as "Mill Spring" and it will be referred to herein as "Mill Spring".

3. Pertinent portions of the application were published in the Dillon Tribune Examiner, a newspaper of general circulation in the area of the source, on September 5, 1989. Additionally, the Department served notice by first class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. (Department's file)

4. The Department received timely objections to the application from the Montana Power Company and Jeff and Patty Walker. The Montana Power Company withdrew their objection on October 15, 1990.

Objectors Walker stated on their objection form that the bases of their objection were: adverse effects to water rights documented by Statements of Claim to Existing Water Rights Nos. 41D-W211932-00 and 41D-W212470-00; that Applicant does not have

possessory interest in the place of use; that because of the existence of many other nearby water developments, Applicant has no need for the proposed appropriation; and, that Applicant has failed to maintain existing developments and therefore should not be issued a new water right. (Department's file)

5. Statement of Claim No. 41D-W211932-00 was filed by Objectors on September 30, 1985, which was not in accordance with § 85-2-221, MCA. The claim is to an historical irrigation right to waters from the proposed source, a use which is not exempted from filing under § 85-3-222, MCA. Statement of Claim No. 41D-W212470-00 was filed by Objectors on June 13, 1988, which was not in accordance with § 85-2-221, MCA. (Department's water rights records, Department's file)

6. Waters of Mill Spring have been used to water stock since before 1914. The Sassmans, original owners of Objectors' property, kept five milk cows with calves, 15 sheep with lambs, and 5 horses, some with colts, on the property that used the spring for water, usually in conjunction with one or both of the other springs on the property. The Reynoldses, immediate predecessors in interest to Objectors, pastured up to 35 cattle on the property that used Mill spring for water, usually in conjunction with the other springs on the property.

Stock have drunk from the waters of Mill Spring both directly from the spring and adjacent pond and from the flows from the spring that would flow down across the pasture where stock were grazing. The actual flow rate and volume beneficially used to

fulfill the maximum historical use of Mill Spring for watering stock was not identified. (Testimony of Otto Sassman and Mary Reynolds)

The historical use of Mill Spring for watering stock falls within the parameters of § 85-2-222, MCA, which exempted claims to existing water rights based on such uses from the filing requirements of the general statewide stream adjudication. In addition, Mike Browne testified that Applicant recognizes Walkers' existing right to water stock from Mill Spring.

Based on the standards for pre-1973 stock water rights, adopted by the Montana Supreme Court at page 53 of the Water Right Claim Examination Rules, the maximum historical use of Mill Spring water for stock use was 1050 gallons per day, i.e., 30 gallons per day multiplied by 35 cow/calf pairs. This figure equates to 1.18 AF per year which can be supplied by a continuous flow rate of 0.73 gpm.

7. Applicant measured the flow of the spring on four separate occasions by directing all flow through a three inch pipe into a bucket, then the volume was measured using a graduated container and the number of gallons per minute was recorded. On March 21, 1990, the flow was 4.4 to 4.6 gpm; on June 6, 1990, it was 6.08 gpm; on August 22, 1990, it was 2.4 gpm; on October 4, 1990, it was 21.4 gpm. The spring flow fluctuates hourly, daily, and seasonally as it reacts to groundwater recharge from precipitation. The increase in flows between August 22 and October 4 is likely reflection of this phenomenon. According to

Applicant's sworn statement at item "a" of the application supplement, employees of Applicant also observed 10 gallons per minute flowing from Mill Spring on September 2, 1988 (though the method of observation and qualifications of observers are not specified). The pond adjacent to the spring provides a reservoir of water that stabilizes the amount of water available during periods of low flows from the spring. (Department's file, Objectors' Exhibit 1, and testimony of Mike Browne, Jeff Walker, and Dean Bolstad)

It was the uncontradicted testimony of Mike Browne that 1990 had been a drought year, that the amount of water measured was as low as one would expect, and that in normal years a lot more water would flow from the proposed source.

Projecting the minimum measured flow rate as continuous, the calculated annual volume of water produced by Mill Spring is 3.87 AF. The sum of Applicant's proposed annual volume (1.60 AF) added to the annual volume of maximum historical stock use by Objectors' predecessors (1.18 AF) is 2.78 AF, which is less than the very conservatively calculated minimum annual output of Mill Spring.

8. Applicant intends to develop this water source for watering stock in the Tungsten Mill Pasture which is a subdivision of the East Pioneer Stewardship Unit of the Lost-Willow Grazing Plan. The application form, at item seven, states 400 as the number of cow/calf pairs to be served by this development. The Lost-Willow Grazing plan identifies the number of livestock

authorized for this pasture as 347. The grazing plan also identifies the period of use of the Tungsten Mill Pasture as May 15 through June 16 only.

The application was filed to provide for the outside parameters of maximum use in terms of animal units and period of use for Tungsten Mill Pasture because the elements of the grazing plan may be modified in the future, including the number of livestock or the period of use of the pastures. Furthermore, the operation of the pasture lands is under the direction of Applicant, who can vary the use of Tungsten Mill Pasture as conditions allow. (Department's file, Objectors' Exhibit 9, and testimony of Mike Browne and Dean Bolstad)

9. Dean Bolstad testified Applicant has a specific purpose and need for the proposed development in that the disbursement of stock over the entire area of the pasture would be aided if the stock could be drawn to the portion of the pasture in which the spring is located by having the water of the spring available to them for drinking.

Objectors identified several sources of water available to Applicant in the Tungsten Mill Pasture. One of these sources, a well in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, is within 200 yards of Mill Spring. Applicant, however, does not have rights on file with the Department for use of this well; the only right on file with the Department for use of this well is Statement of Claim for Existing Water Right No. 41D-W040063-00 owned by Kambich Ranch,

Inc. (Department's water rights records, Department's file; testimony of Jeff Walker and Dean Bolstad)

10. The Department standard for the amount of water reasonably required per animal unit (cow/calf pair) is 0.017 AF per year. For 400 animal units over the proposed period of use (194 days), the amount reasonably needed calculates to 3.6 AF per year which is considerably greater than the 1.6 AF per year applied for by Applicant. (Department's file, Department's policy manual)

11. The proposed means of diversion is an infiltration gallery which has been more specifically described as a perforated culvert, 30 inches in diameter, placed vertically in the small existing pond adjacent to Mill Spring, with a filtration device to screen sediments. The water would be conveyed by 200 feet of 1½ inch pipe from the culvert to a 450 gallon stock tank. The inflow pipe would have a float valve at the stock tank to prevent water from being diverted into the tank when the tank is full. The stock tank provides a small amount of storage to stabilize availability of water during periods of low flows from Mill Spring. The diversion and conveyance system was described as a standard method of developing a spring for stock watering purposes which was proposed for this specific development by Applicant's district engineers. (Testimony of Mike Browne, Department's file)

12. Several sources of water exist in the Tungsten Mill Pasture which have historically been used for watering the stock

grazed there. The Grazing Plan states that maintaining such sources of water is the responsibility of the grazing permittee or the BLM as specifically identified. One of these sources is the Mineral Well, a developed spring in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8, to which Applicant has filed Statement of Claim to Existing Water Right No. 41D-W078175-00 for use by livestock. The Lost-Willow Grazing Plan identifies maintenance of Mineral Well as the responsibility of Applicant.

Objectors submitted testimony and evidence that many of the sources of water in Tungsten Mill Pasture, including Mineral Well, had been allowed to fall into disrepair. Photographs of the Mineral Well development show varying states of functionality at different times. They also show signs of use of Mineral Well by livestock. Dean Bolstad testified that one of the developments, "McVee Spring", has not been maintained because it is a very marginal source of water, and the development should be removed.

Applicant stated that restoring developments, such as the dysfunctional well in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, to full functionality was possible but not as economical or desirable as developing Mill Spring, especially when consideration of the reliability of the source is included in the analysis. (Department's water rights records; Objectors Exhibits 9, 10, and 11; testimony of Jeff Walker and Dean Bolstad)

13. Objectors allege that a contributory relationship exists between Mill Spring and two springs down gradient in

Sassman Gulch; one in the SW¹/₄NW¹/₄ of Section 9 and another in the SE¹/₄SE¹/₄NW¹/₄ of Section 8. Statements of Claims to Existing Water Rights Nos. 41D-W049909-00 and 41D-W049910-00, respectively, were filed on these springs, and have been transferred into Objectors' names. Both claims and their respective supporting documentation identify springs at single specific points as the sources and make no reference to secondary sources.

Testimony was given that currently 70 to 80 percent of the water from Mill Spring flows past the line between Sections 5 and 8, and historically water has flowed from Mill Spring across the subject property in ditches; however, the hearing record (including the files of the water rights claims) contains nothing regarding a relationship between Mill Spring and these two springs beyond speculation by Objector Jeff Walker. (Testimony of Mike Browne, Otto Sassman, and Jeff Walker; Department's water rights records)

14. There is a fence in the area of the proposed development that does not follow the line between Sections 5 and 8 and which is considered by the Objectors to be the boundary of their property. The proposed source and place of use are within this existing fenceline which has been at its present location since at least 1914. Sassmans always maintained the fenceline as their property boundary during the family's ownership of the property which was until about 1946. At no time during Sassman's time on the property did the government try to take over possession of the area in Section 5 within the fence, nor did they ever try to

change the fenceline. (Department's file, Objectors' Exhibits 2, 2A, and 3; testimony of Otto Sassman and Mary Reynolds)

15. Ownership of the land in Section 5 enclosed within the existing fence and which includes the spring and place of use is a matter of dispute. Applicant provided plats from its own records showing that the property is owned by Applicant and provided undisputed testimony that the records of Beaverhead County agreed with the submitted materials. Objectors provided testimony and documentation supporting the contention that the land in question had been the subject of a land exchange between Applicant and C. W. Frame, Objectors' predecessor in interest. The documents are ambiguous as they refer to an exchange of land, e.g., "The Government land that he had fenced in was exchanged for the private land which he had fenced out." and "In consideration of the Federal Range...C. W. and Gladyce E. Frame will exchange their private land lying outside their fence...", but also refer to an exchange of use of the land, e.g., "This exchange of use does not cover the land in..." (emphasis added). The disagreement (which testimony indicates stems from the ambiguities) between Applicant and Objectors about the ownership of the land containing the proposed place of use is called by Applicant a "Trespass...Dispute" and "a common dispute of the actual boundary of the original homestead". (Applicant's Exhibit 1, Objectors' Exhibits 4, 5, 7, and 8; testimony of Frances Rieman, Otto Sassman, and Jeff Walker)

16. There are no planned uses or developments for which a permit has been issued for use of the waters of Mill Spring or Sassman Gulch, in which Mill Spring is located. Neither the waters of Mill Spring nor the waters of Sassman Gulch have been reserved for future use. (Department's file, Department's water rights records, testimony of Mike Browne)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Mont. Code Ann. Title 85, Chapter 2, Part 3 (1989).

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1, 2, 3, and 4.

3. The Department must issue a permit if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-311, MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use:

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. To meet the substantial credible evidence standard, the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1989).

5. It is within the Department's jurisdiction to make preliminary administrative determinations of the existence and extent of claimed water rights. Such determinations are only to further the Department's duties and have nothing to do with adjudicating the rights under review. See In re Application No. 42666-g41F by McMillan; In re Application No. 63377-s76G by Hollenbeck; In re Applications Nos. 49632-s41H, G120401-41H, and G120403-41H by Estate of Ryen; In re Applications Nos. 12123-s76M and 9782-c76M by Bladholm.

Under the provisions of § 85-2-226, MCA, and as later held by the Montana Water Courts in Case No. 43B-LC-1, water rights not claimed in accordance with § 85-2-221, MCA, are conclusively presumed to be abandoned. Without a specific determination by a court of competent jurisdiction establishing the validity of

Objectors' late claims, i.e., Statements of Claim for Existing Water Right Nos. 41D-W211932-00 and 41D-W212470-00, the Department cannot consider them as interests which may be adversely affected by a proposed appropriation of water. See Findings of Fact 4 and 5.

Objectors have an historic right to water stock from the waters of Mill Spring which is of the use type exempt from filing requirements. See Mont. Code Ann. §85-2-222 (1989); Finding of Fact 6.

6. Applicant has proved by substantial credible evidence the availability of unappropriated water in the source of supply at the proposed point of diversion in the amount applied for, and that during the proposed period of diversion the amount applied for is reasonably available. See Findings of Fact 6 and 7. The test for availability of unappropriated water consists of proving the physical presence of water at the intended points of diversion. See § 85-2-311(1)(a); In re Application No. 70511-s76LJ by Winter Sports, Inc.; In re Application No. 63997-g42M by Crisafulli; Department of Natural Resources and Conservation, Summary Report: Clark Fork Basin Water Use (1990).

7. The proposed use of water, stock water, is a beneficial use of water. See § 85-2-102(2) (1989). Applicant has provided substantial credible evidence that the use of the water will benefit them. Furthermore, Applicant identified a benefit unique to the proposed appropriation. The period of use and amounts of

flow and volume are reasonable for the proposed purpose. See Findings of Fact 2, 8, 9, and 10.

There was much discussion and some briefing on the concept of "beneficial need". While Applicant has water rights on record for other sources which may total an amount adequate to satisfy the identified need, Applicant is not bound to the use of the alternate sources, and is not precluded from establishing a new appropriation of water for precisely the same purpose from an additional source. See Boyd v. Huffine, 44 Mont. 306, 120 P. 228 (1911); In re Application No. G65713-76N by Fred Fagan. See generally In re Application No. 54911-g42M by Sackman, Inc.; In re Application No. 38719-s430 by Duane and Vicki L. Bender. This notwithstanding, Applicant has identified a specific need unique to this source in its location in an area of Tungsten Mill Pasture where Applicant owns no water rights.

8. The proposed means of diversion, construction, and operation of the appropriation works would be adequate. See Findings of Fact 2, 11, and 12.

Objectors allege that lack of maintenance of Applicant's other water developments in Tungsten Mill Pasture show a habit that will extend to the proposed development, and therefore the operation of the proposed appropriation would be inadequate. Objectors' evidence is ambiguous, however, as to the degree of dysfunction the identified level of disrepair has caused. Applicant provided testimony that, contrary to Objectors' contention of habit, the state of disrepair has been the result of

analysis and decision regarding these specific developments. See Finding of Fact 12.

The law requiring this proof, § 85-2-311(1)(c), MCA, has generally been interpreted to mean an applicant must show that their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. Applicant fulfilled this criteria by providing their system design plans and testimony about the system. The design and functioning of the proposed appropriation works is adequate to satisfy the intended purpose without waste, therefore it is concluded that § 85-2-311(c) is met.

9. The water rights of a prior appropriator will not be adversely affected by the proposed appropriation. See Findings of Fact 6, 7, and 13.

Objectors have the burden of producing facts sufficient to raise allegations of adverse affect to a level of plausibility. See In re Application No. 55749-g76LJ by Meadow Lake Country Club Estates; see also In re Application No. G15928-76H by Samuel T. and Virginia Allred. Objectors' allegation that the proposed appropriation would adversely affect their irrigation water rights from down gradient springs is speculative. Mere speculation does not fulfill Objectors' burden of production; accordingly, there is no burden on the Applicant to disprove the

allegations. See In re Application No. 70584-g41B by Petersen Livestock.

Also lacking is certain information that is particularly within Objectors' power to produce: specifically how they anticipate the proposed appropriation will change the conditions of water occurrence in the down gradient springs, and why they will not be able to reasonably exercise their water rights to those springs under the changed conditions. See In re Application No. 60117-g76L by Houston. There is no evidence in the record of any shortages or imminent shortages of water from the springs that are Objectors' sources for water rights described in Claims Nos. 41D-W049909-00 and 41D-W049910-00.

10. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Conclusion of Law 8; Finding of Fact 16.

11. The Department does not have jurisdiction to decide land ownership disputes. See generally In re Applications Nos. 1-s41H and 98-c41H by Marvin M. and Helen R. Morgan; In re Application No. 2632-s41F by Stephan F. McDonnell; In re Application No. 4501-s41E by North Boulder Drainage District; In re Application No. 5266-s410 by Farmers Co-op Canal Company. Applicant and Objectors both characterize ownership of the place of use as a matter that is in dispute, and Objectors produced documentation of the dispute. See Findings of Fact 14 and 15.

There being no evidence of a settlement of the dispute through agreement or through adjudication by a court of competent jurisdiction, the ownership of the place of use is an unanswered question. Furthermore, there is no evidence that Applicant, in the alternative, obtained the consent of Objectors thereby making the issue of ownership moot before the Department. As a result, it is concluded that Applicant has not met the criterium requiring proof of possessory interest, or written consent of the person with possessory interest, in the property where the water is to be put to beneficial use.

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 72399-s41D by United States of America, United States Department of the Interior, Bureau of Land Management, is hereby denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 4th day of February, 1991.



John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301

MEMORANDUM

Pursuant to § 2-4-623(4), MCA, the Proposed Findings of Fact submitted by Objectors on November 16, 1990, are addressed as follows:

Proposed Finding of Fact 1. The points made in this proposed finding are contained in the Proposal of Decision at Findings of Fact 6, 14, and 15, except for the characterization of the past use of Mill Spring as "exclusively by private owners". The determination of the level of the historic use of the spring by Objectors' predecessors in interest is addressed in the Proposal for Decision at Finding of Fact 6.

Proposed Finding of Fact 2. The points made in this proposed finding are contained in the Proposal of Decision at Finding of Fact 15, except that the ambiguities of the document are also addressed.

Proposed Finding of Fact 3. See Proposal for Decision at Finding of Fact 15.

Proposed Findings of Fact 4, 9, 10, 11, and 12. The points in these five proposed findings are all inherent within the

dispute over the ownership of the parcel of land in which Mill Spring and proposed place of use lie. This is the issue over which the Department has no jurisdiction. To address in this Proposal for Decision the effect of Applicant's actions as owner of the disputed parcel is premature; they may or may not have that control.

Proposed Finding of Fact 5. See Proposal for Decision at Finding of Fact 13.

Proposed Finding of Fact 6. See Proposal for Decision at Finding of Fact 6.

Proposed Finding of Fact 7. See Proposal for Decision at Finding of Fact 5.

Proposed Finding of Fact 8. See Proposal for Decision at Finding of Fact 13.

Proposed Finding of Fact 13. The figures given by Objectors here are derived by subtracting the percentages of Mill Spring output said to have flowed across the line between Sections 5 and 8 from the flow levels measured by Applicant. (Proposal for Decision at Findings of Fact 7 and 13) Objectors have not shown a right to specific flow rates (particularly the entire flow), just a right to the amount of water beneficially used by the livestock, as identified solely by testimony on historical numbers of livestock. (Proposal for Decision at Findings of Fact 6 and 13)

Proposed Findings of Fact 14 and 15. See Proposal for Decision at Finding of Fact 8.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 4th day of February, 1991, as follows:

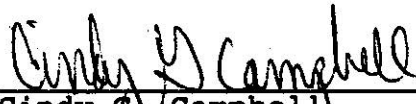
Bureau of Land Management
Dillon Resource Area
1005 Selway Drive
Dillon, MT 59725

Jeff and Patty Walker
Box 81
Glen, MT 59732

John C. Chaffin
Office of the Field
Solicitor
P.O. Box 31394
Billings, MT 59107-1394

R. Mark Josephson
Josephson & Fredricks
115 West Second Avenue
P.O. Box 1047
Big Timber, MT 59011

T.J. Reynolds, Manager
Water Resources Division
Field Office
1520 East 6th Avenue
Helena, MT 59620


Cindy G. Campbell
Hearings Unit Secretary